



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOP/155425

PRELIMINARY RECITALS

Pursuant to a petition filed February 10, 2014, under Wis. Admin. Code §HA 3.03, to review a decision by the Washington County Department of Social Services in regard to FoodShare benefits (FS), a telephonic hearing was held on May 08, 2014.

The issue for determination is whether the agency has established an overpayment of FS against the petitioner.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Karen S. Roehl
404 N Main Street Suite #702
Oshkosh, WI 54701

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Ken Benedum

Washington County Department of Social Services
333 E. Washington Street
Suite 3100
West Bend, WI 53095

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Washington County and has been a recipient of FS since 2008. He has lived with his mother since at least 2008.

2. From June 2008 through March 2013, petitioner received FS a FS group of 1.
3. In March 2013, petitioner had a phone review for his FS. At that time the agency worker determined that petitioner was an FS group of 2. At some point thereafter the agency requested petitioner's mother's income verification, which was provided to the agency. The agency did not add in the mother's income when determining the amount of FS to be issued, but the amount of FS issued was for a group of 2 from April 2013-November 2013.
4. In October 2013 petitioner submitted his six month report form (SMRF). It appears that at that point the agency discovered the error of not including the mother's income in the FS calculation. When the mother's income was calculated for the case, the agency determined that they were over the FS limit and closed petitioner's FS case effective December 1, 2013. See Exhibit 2. The closure of the FS case is discussed in the companion case DHA Case No. FOO-155427.
5. On November 7, 2013 the agency issued six notices to petitioner advising him that a FS overpayment was being charged against him for the time period of June 1, 2008 – November 30, 2013, in the total amount of \$8380. See Exhibits 6-11.

DISCUSSION

The Department is required to recover all FS overpayments. An overpayment occurs when an FS household receives more FS than it is entitled to receive. 7 C.F.R. §273.18(c). The federal FS regulations provide that the agency shall establish a claim against an FS household that was overpaid, even if the overpayment was caused by agency error. 7 C.F.R. §273.18(b)(3). All adult members of an FS household are liable for an overpayment. 7 C.F.R. §273.18(a)(4); See also *FS Handbook*, §7.3.1.2, available online at <http://www.emhandbooks.wisconsin.gov/fsh/fsh.htm>. Here, the agency argues that the petitioner and his mother should have been an FS group of 2 since June 2008, and therefore he received more FS than he was eligible to receive.

FS eligibility is based upon financial and nonfinancial factors. For the nonfinancial factors, eligibility for FS is determined by gathering certain information about household members. See *FS Handbook* §3.3.1.1. Households consist of all persons living in or temporarily absent from the same residence. *Id.* Food Units are considered to be one or more persons who live in the same household and purchase and prepare food together for home consumption. *Id.* The *FS Handbook* also provides examples:

Examples of a food unit include:

1. A person living alone.
2. A group of persons living together who purchase and prepare meals together for home consumption.
3. A person (or group of persons) living with others, but who usually purchases and prepares food for home consumption separately from the others.

Purchase and Prepare

People living together who:

1. Share in the cost of purchasing food.
2. Share in the preparation of food.
3. Eat together.

Each person does not have to shop, provide money, prepare food, and eat together. Any of those activities is sufficient to include a member in purchasing and preparing food with the group.

Id.

In March 2013, petitioner had a phone review for his FS. Apparently at that time the agency worker determined that petitioner was an FS group of 2 because he/she considered petitioner and his mother to purchase and prepare food together. The worker who made that determination was not present at hearing to explain what was said and asked of petitioner at that time. However, the agency relies on the Case Comment from that date to prove its overpayment case. See Exhibit 1. The agency also relies on the Case Comment from the November conversation the mother had with a worker in determining that the overpayment should begin with the first date petitioner began receiving FS. *Id.*

The first problem with this case is that this Case Comment information is hearsay. Although hearsay is admissible in administrative hearings, Wisconsin courts have long held that agencies may never base findings solely upon uncorroborated hearsay. Our Supreme Court reaffirmed this position in *Gehin v. Wisconsin Group Insurance Board*, 2005 WI 16, a decision that overturned a finding based upon untestified to medical records that were contradicted by petitioner's sworn testimony. The court's rationale was that "...the purpose of allowing the admission of hearsay evidence is to free administrative agencies from technical evidentiary rules, but at the same time this flexibility does not go so far as to justify administrative findings that are not based on evidence having rational probative force." *Id.* at ¶54. That decision upheld this principle even in some instances where the evidence met one of the exceptions to the hearsay rule:

Without deciding whether all or any parts of the written medical reports in the present case are admissible under a hearsay exception, we conclude that the court of appeals' reasoning that hearsay evidence is unreliable only when it does not fall within a hearsay exception confuses the admissibility of hearsay with the issue of the probative force to be accorded the hearsay evidence by an administrative agency decision-maker. Hearsay that is subject to an exception is still hearsay, and therefore the substantial evidence rule applies even to evidence admitted as an exception to the hearsay rule.

Id. at ¶89.

Thus, even when hearsay is allowed, it must be of the sort that is clearly reliable. If the agency wants to rely on the written statements in Case Comments from an agency worker, then the prudent course of action is to subpoena these persons to testify at the administrative hearing. It chose not to do so here. Rather, I have the direct testimony of the petitioner and mother who credibly explained why they do not customarily purchase and prepare foods together and have not done so in the past. Therefore I must find that the agency has not met its burden to show that an overpayment exists prior to April 2013.

Further, the agency admits its error in not including the mother's income with the April-November 2013 FS issuance, yet it issued FS as a group of 2. Therefore it is plain to see that petitioner received more FS than to which he was entitled if he was a group of 1. As stated above, the federal FS regulations provide that the agency establish a claim against an FS household that was overpaid, even if the overpayment was caused by agency error. 7 C.F.R. §273.18(b)(3). This brings us to the second problem with this case. The overpayment worksheets do not show the monthly calculations for this entire period and the worker present at hearing could not explain them either. This is not acceptable practice for the agency. A client cannot know if the agency's overpayment calculation is correct if the necessary entries are not made on the overpayment worksheet. Thus, I will direct rescission of the overpayment due to defective notice. The agency may try to recover any overpayment for these months in the future, if the agency issues a new Notification of FS Overissuance and correct worksheet to the petitioner for this time period.

CONCLUSIONS OF LAW

The agency has not met its burden of proof to establish an overpayment of FS against the petitioner.

THEREFORE, it is

ORDERED

That the matter is remanded to the county agency with instructions to rescind the FS overissuance Claim # [REDACTED], # [REDACTED], # [REDACTED], # [REDACTED], # [REDACTED], and # [REDACTED] and to cease all collection or recovery activities based upon the claims, had such collections begun. These actions shall be completed within 10 days of the date of this Decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

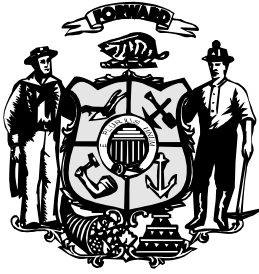
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 22nd day of May, 2014

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on May 22, 2014.

Washington County Department of Social Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
Attorney Karen Roehl